

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

ALTEIRA AMERICA INSURANCE CO., et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652813/2012

Hon. Andrea Masley

Motion Sequence No.: 22

DISCOVER PROPERTY & CASUALTY  
COMPANY, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652933/2012

Hon. Andrea Masley

Motion Sequence No.: 23

**REPLY AFFIRMATION IN  
SUPPORT OF THE NON-PARTY  
TEAMS' MOTION FOR A  
PROTECTIVE ORDER AND TRO****ESTHER N. BIRNBAUM**, of full age, hereby affirms as follows:

1. I am an E-Discovery staff attorney at the law firm of Proskauer Rose LLP, counsel for the Non-Party Teams<sup>1</sup> in connection with the Coverage Actions.

2. I respectfully submit this affirmation in support of the Non-Party Teams' motion for a protective order and TRO, and to apprise the Court of the status of the Non-Party Teams' document productions, in accordance with the Court's April 29, 2019 Order (the "Order").

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<sup>1</sup> Unless otherwise defined herein, all defined terms have the meanings ascribed to them in the Non-Party Teams' moving papers.

3. I am responsible for helping to organize and oversee the E-Discovery search, review and production efforts in this matter. My team and I have also been responsible for the coordination, analysis and supervision of the forensic E-Discovery vendor retained to support the Non-Party Teams' collection, processing, search and production efforts. During the course of this engagement, I have worked closely, and coordinated, with the attorneys responsible for the document review and production in this matter. I have analyzed the underlying data associated with the extensive E-Discovery efforts in this matter, and am familiar with the facts and circumstances contained herein.

4. In accordance with the Court's Order, the Non-Party Teams sought to produce non-objectionable documents responsive to the Subpoenas on or before June 1, 2019, by using (i) the search terms previously used by the NFL Parties in connection with their discovery efforts in this matter; (ii) the search terms approved by Special Referee Michael H. Dolinger in his February 26, 2019 Memorandum and Order; and (iii) additional team-specific search terms provided by the Insurers in their May 6, 2019 letter. In accordance with the Order, the Non-Party Teams' production excluded documents that were either privileged or subject to applicable federal or state statutory, regulatory, or common law protections precluding disclosure of personal medical or health information (the "Excluded Documents").

5. By letter dated May 30, 2019, the Non-Party Teams advised the Insurers that they intended to produce non-objectionable documents (to the extent they exist and were not unduly burdensome to identify, locate and/or retrieve) from those custodians likely to have relevant, non-objectionable information responsive to the Subpoenas, *i.e.*: (a) Head Athletic Trainers from each team's inception through July 19, 2011; (b) Head Equipment Managers from each team's inception through July 19, 2011; and (c) employees of each team (if any, and from each team's

inception through July 19, 2011) that were members of the following NFL Committees: (i) the Mild Traumatic Brain Injury Committee; (ii) the Head, Neck and Spine Committee, and (iii) the Injury and Safety Panel (collectively, the “Custodians”).

6. As part of the document collection and production efforts, counsel worked with the appropriate personnel from each of the 32 Non-Party Teams to collect available data from the relevant Custodians, including information stored on desktop and laptop computers, mobile tablets, such as Surface Pros, group and personal share drives, as well as other types of network data. Available and accessible back-up tapes and hard-copy documents were also collected. The search terms were then applied to the collected data, and a document review team reviewed the resulting data set for responsiveness and privilege. As noted, the review team also segregated medical records for exclusion from the production, and indicated whether the withheld medical records related to head injuries or another irrelevant medical condition.

7. From the time of the Court’s Order, the Non-Party Teams have been engaged in a massive document collection and production effort involving the onsite imaging of material, the processing of 1,700 gigabytes of data, 38 vendor-employed electronic discovery professionals, and well over 1,000 hours of work. In addition, lawyers have spent nearly 2,000 hours reviewing and analyzing documents and preparing them for production.

8. On May 31, 2019, the Non-Party Teams produced 4,631 responsive documents, consisting of 16,519 pages of material from 39 different Custodians. Ninety-nine documents were withheld from the production for privilege.<sup>2</sup>

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<sup>2</sup> A small number of the Non-Party Teams have not yet produced documents either because the data was not readily available or because no responsive records exist. Additional Custodian data collected from three of those Non-Party Teams, the Rams, Chiefs, and Vikings, is now being

9. The Non-Party Teams have recently collected additional documents from 23 new Custodians. The search terms have been applied to this data, and the resulting documents are currently being reviewed for responsiveness and production. The Non-Party Teams expect to make a significant, supplemental production of documents on or before June 12, 2019.

10. The Non-Party Teams, E-Discovery specialists and counsel continue to work diligently to collect and review the requested materials, and intend to complete their production as soon as practicable.

Dated: June 7, 2019



ESTHER N. BIRNBAUM

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processed, searched, and reviewed. For three other of those Non-Party Teams, the Lions, Bears and Bills, we expect to begin that same process imminently. For one of the Non-Party Teams, the Cowboys, they have advised us that they do not have any responsive records due to a 400-day retention policy for e-mails and the fact that the oldest files present on group and personal share drives post-date the relevant time period.

**CERTIFICATION OF COMPLIANCE WITH WORD LIMIT**

I certify that this affirmation complies with the 7,000-word limit under Commercial Division Rule 17. This computer generated affirmation was prepared using Microsoft Word, and based on Microsoft Word's word count function, the total number of words in this affirmation, exclusive of the caption and signature block, is 1002.

Dated: June 7, 2019

  
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ESTHER N. BIRNBAUM